

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2137

To be argued by
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEON BUSH,

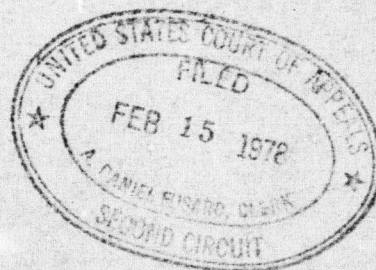
Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

BRIEF FOR APPELLEE



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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LEON BUSH,

Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.
-----X

BRIEF FOR APPELLEE

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Pratt, J.), dated May 23, 1977, denying, without a hearing, petitioner-appellant's (hereinafter "petitioner's") application for a writ of habeas corpus. The District Court granted a certificate of probable cause on September 28, 1977.

Questions Presented

1. Has petitioner so radically changed his argument before this Court so that his appeal should be dismissed for failure to present his argument to the court below and for failure to exhaust his state remedies?

2. Has petitioner suffered any prejudice by operation of New York's former notice-of-alibi statute?

3. Should Wardius v. Oregon not be applied retroactively to this case?

4. Does the traditional harmless error test preclude the application of Wardius v. Oregon to petitioner?

Statement of Facts

Petitioner is presently incarcerated in the Green Haven Correctional Facility, Stormville, New York, pursuant to a judgment of conviction of the Supreme Court, Kings County (Barshay, J.), entered on September 22, 1971. He was convicted, after a trial by jury, of the crimes of felony murder and manslaughter in the second degree. He was sentenced to concurrent indeterminate sentences of fifteen years to life on the felony murder charge and a maximum of fifteen years on the manslaughter charge.

The conviction was affirmed by the Second Department, 40 A D 2d 591 (1972) and the Court of Appeals, 33 N Y 2d 921 (1973), motion to amend remittitur granted, 34 N Y 2d 537 (1974) cert. den. 419 U.S. 848 (1974)

A motion for a writ of error coram nobis was denied by the Supreme Court, Kings County (Brownstein, J.) on April 13, 1976, motion to reargue denied May 24, 1976, leave to appeal denied July 20, 1976.

State Trial Court Proceedings

Huntley Hearing

The Huntley hearing* was held immediately before the trial, on May 3, 1971. Detective Donald McCarthy testified that he arrested petitioner on February 17, 1970 (3).** Petitioner was charged with the August 30, 1969 killing of Robert Wheeler.

Leon Bush identified himself as Donald Bush and claimed that he had just been released from the Brooklyn House of Detention (5). Bush was advised of his constitutional rights in the police car (36) and at the station house (6-8). He claimed that he had a brother named Leon Bush (10).

* Held pursuant to People v. Huntley, 15 N Y 2d 72 (1965) to determine the voluntariness of petitioner's confession.

** Page references are to the trial transcript which has been supplied to the Court by petitioner.

After being shown some identifying information from the New Orleans Police Department, Bush admitted his identity (14-16) and soon stated "Do you want to know about the stabbing?" (17).

Petitioner then stated that he and his cousin had seen a "whiteman" near a "record shop" (18) whom they followed until he turned around with a knife in his hand. Petitioner then drew his knife and told the victim that he wanted all of his money. "The deceased then raised his hand with his knife, and that is when I stabbed him in the side. The deceased then backed up across the street, and I went through his pockets and stabbed him again" (19).

Bush took the victim's watch and secreted his murder weapon in a vacant apartment (19). After the oral confession was given, Bush agreed to reduce it to writing, and the District Attorney's office was notified (20). The written confession was signed (23) and received into evidence.

Two other detectives, the hearing reporter who transcribed the confession, and the assistant district attorney who took the written confession testified that Bush was not mistreated (85, 104, 117-18, 130).

Bush testified that he was advised of his rights in the car (151) and that he was beaten (156-60, 197).

On rebuttal, a correction Officer at the Department of Corrections and the physician for the Department testified that Bush showed no signs of a beating (214-16, 225-38).

The Court rendered an oral decision finding that Bush's confessions were voluntary (245-47).

Following jury selection, petitioner moved to set aside New York's notice-of-alibi statute* on the ground that it did not provide for reciprocal discovery. No specific claim of prejudice was made (265-268).** The prosecutor pointed out that his rebuttal witnesses were known to Bush (267-68). The motion was denied (268).

* The Code of Criminal Procedure, § 295-1, restated in Criminal Procedure Law § 250.20, effective September 1, 1971, and revised to comply with People v. Bush, supra, see pp. 13-14, post for the text of CCP § 295-1.

** The same grounds for the overturning of New York's notice-of-alibi statute were urged upon the Court in a pre-trial motion. See Affidavit of Arnold D. Rosenman, attorney for defendant dated August 19, 1970, a copy of which has been supplied to the Court by appellant's attorney. Again there was no specific claim of prejudice.

The Trial

Various witnesses testified to the finding of the victim, his death from a stab wound in the chest, the identification of the victim, the arrest of Bush, and Bush's confession (296-434).

Petitioner presented an alibi defense through the reading into the record of interrogatories conducted in New Orleans, Louisiana, under the auspices of a commissioner. Five relatives of Bush testified, through those interrogatories, that he was in New Orleans at the time of the murder (455-514).

Petitioner's brother Donald, as well as petitioner, testified at the trial that petitioner was in New Orleans at the time of the murder (518-545). Bush also claimed again that his confession had been extracted from him (559-61).

The people presented a number of witnesses to contradict Bush's claim that his confession had been beaten out of him (594-610, 656-84).

Three witnesses were then presented to rebut petitioner's alibi. Frank Rawitz owned a bar frequent by Bush for whom he had cashed a check in August, 1969, the month

of the murder. The check was cashed on August 26, 1969, the day before Bush had claimed to be in New Orleans. The check, endorsed by Bush, was placed in evidence. There was no cross-examination (610-612a).

Della Curtis, a licensed practical nurse, testified that she and her husband ran a boarding house at which petitioner lived from July through the middle of September, 1969 (T. 621-24).

Mrs. Curtis was extensively cross-examined (624-33, 634-35).

Miller Curtis testified to seeing Bush frequently during July, August and September, 1969 both at his boarding house and at Mr. Rawitz's bar where he, Miller, worked (635-3a). Mr. Curtis also was extensively cross-examined (639-652, 653-54). The notes made by the Assistant District Attorney of his prior conversation with Curtis were turned over to the petitioner (646).

After the testimony of the rebuttal witnesses, petitioner moved to strike their testimony on the ground that they should have been identified to him earlier "so that I could do a better job on cross-examining; although I hope I did a job" (655).

In his summation, after emphasizing the testimony of his alibi witnesses (696-697), petitioner stated:

"I am not going to go into the other alibi witnesses, what we call the defense of non-presence, because I will put my witnesses against these two characters, the Curtis' who came here yesterday, and I will leave that to you to decide how much credence, or as we lawyers call it, how much weight you will give to that type of testimony from those two people who never told anybody about it until two or three weeks ago" (697).

And again (708-09).

Petitioner was convicted. He was sentenced on September 22, 1971

First Level State Appeal

Petitioner's brief to the Appellate Division contains eight points.* The point challenging New York's notice-of-alibi statute is two pages (pp. 28-29). There is neither a claim of prejudice nor a claim that petitioner's trial attorney would

* Bush's state appellate briefs and petition for certiorari and the District Attorney's Appellate Division brief and opposition to certiorari are provided the Court herewith.

have been able to obtain information for use in cross-examination had he had the names of the alibi rebuttal witnesses prior to trial.

Petitioner's conviction was affirmed without opinion.
40 A D 2d 591 (2d Dept. 1972).

Second Level State Appeal

Petitioner's main brief to the New York Court of Appeals also urged eight points upon the Court. The point concerning the notice-of-alibi statute (pp. 27-33) again neither claims nor specifies any prejudice and contains no statement that his trial attorney would have been able to obtain more information for use in cross-examination had he been provided a list of the prosecutor's rebuttal witnesses prior to trial.

After the Supreme Court decided Wardius v. Oregon, 412 U.S. 470 (1973), petitioner submitted an "Addenda to Appellant's Brief of Law and Additional Papers to the Court of Appeals". The brief only points out Wardius v. Oregon, supra to the Court and provides it with a copy of the opinion.

The Court of Appeals, 33 N Y 2d 921 (1973) held New York's notice-of-alibi statute unconstitutional, but refused to apply its holding retroactively to petitioner since he had not been precluded from introducing his alibi defense. The court stated:

Per Curiam. We find no significant difference between section 295-1 of the Code of Criminal Procedure, applicable here, and the notice-of-alibi statute of the State of Oregon held unconstitutional by the United States Supreme Court in Wardius v. Oregon (412 U.S. 470). Accordingly we hold section 295-1 unconstitutional.

We recognize, however, "the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective'" (Johnson v. New Jersey, 384 U.S. 719, 726). In our view section 295-1 as applied in this instance did not operate to exclude testimony. In response to the District Attorney's demand, defendant here furnished the names of his alibi witnesses. Their testimony was admitted on trial, as was that of the prosecution's rebuttal witnesses. The statute operated only to deny defendant advance notice of the identity of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony. He was not, however, inhibited in his own opportunity by direct evidence to establish his alibi. The infringement

of defendant's rights went only to a collateral though not unimportant issue. Thus, we conclude that on this record the operation of the rule did not go to "the very integrity of the fact-finding process"; rather it touched on procedural fairness to defendant.

On the basis of this evaluation we hold that Wardius and our present decision shall apply to cases in which the trial began after June 11, 1973, the date of the Supreme Court decision in Wardius (cf. Linkletter v. Walker, 381 U.S. 618; Tehan v. Shott, 382 U.S. 406; Johnson v. New Jersey, *supra*; Stovall v. Denno, 388 U.S. 293; see People ex rel. adogan v. McMann, 24 N Y 2d 233), but shall not apply to cases where the trial began prior to that date, unless, as occurred in Wardius but unlike the situation here, the rule was applied to prevent a defendant from introducing testimony to support his alibi defense as a sanction for his failure to comply with the notice-of-alibi statute. We do not reach the question as to retroactivity on direct appeal in such cases and leave that determination to anotehr day.

We have examined appellant's other contentions and find them to be without merit.

Accordingly the order of the Appellate Division is affirmed.

The Court of Appeals later granted petitioner's motion to amend remittitur, 34 N Y 2d 537 (1974) and amended it by including, inter alia:

"On the appeal herein there were presented and necessarily passed upon the following questions under the Constitution of the United States, viz: (1) Does the refusal of the court retroactively to apply the Wardius rule, of unconstitutionality of the New York State notice-of-alibi statute (Code Crim. Pro. § 259-1) to appellant's trial, which commenced and was concluded prior to June 11, 1973, the date of Wardius (ibid.), violate the Fourteenth Amendment to the constitution of the United States?"

This issue was presented by petition for certiorari which was denied. 419 U.S. 848 (1974).

The Federal Habeas Petition

Petitioner presented eleven questions to the District Court including his notice-of-alibi claim and a claim that his confession was coerced.

The District Court dismissed the petition finding, inter alia, that there was "ample support in an extensive

record" (A. 6)* for the state court's finding petitioner's confession was voluntary.

With respect to petitioner's notice-of-alibi claim, the Court found (A. 16-22).

Finally, Bush's petition presents a claim predicated on the Supreme Court's holding in Wardius v. Oregon, 412 U.S. 470, 472 (1967) that the due process clause for-
morcement of [notice-of-] alibi
rules unless reciprocal rights are given to criminal defendants. At the time of Bush's trial -- more than two years before Wardius was decided -- then § 295-1 of New York's Code of Criminal Procedure provided:

In all cases where a defendant has been indicted by a grand jury, the prosecuting officer may, not less than eight days before the case is moved for trial, serve upon such defendant or his counsel and file a demand which shall require that if such defendant intend to offer, for any purpose whatever, testimony which may tend to establish his presence elsewhere than at the scene of the crime at the time of its commission, he must within four days thereafter serve upon such prosecuting officer and file a bill of

* Page references preceded by "A" refer to the Appendix in this Court.

particulars which shall set forth in detail the place or places where the defendant claims to have been, together with the names, post-office addresses, residences, and places of employment of the witness upon whom he intends to rely to establish his presence elsewhere than at the scene of the crime at the time of its commission. Unless the defendant shall pursuant to such demand, serve and file such bill of particulars, the court, in the event that such testimony is sought to be interposed by the defendant upon the trial for any purpose whatever, or in the event that a witness not mentioned in such bill of particulars is called by the defendant to give such testimony, may exclude such testimony, or the testimony of such witness. In the event that the court shall allow such testimony, or the testimony of such witness, it must, upon motion of the prosecuting officer, grant an adjournment not to exceed three days.

Pursuant to this provision, the prosecution served upon Bush's counsel a demand for foreclosure of (1) any alibi defense might be presented at trial, and (2) the names and addresses of possible alibi witnesses. After an unsuccessful pretrial attack upon the constitutionality of New York's notice-of-alibi rule, defense counsel complied with the prosecution's demand. Then, on the eve of trial he moved that the prosecution be directed to disclose the names and addresses of any rebuttal witnesses, but the motion was denied. As noted previously, Bush attempted to establish an alibi defense, and the prosecution called three witnesses to rebut it. By the time the case reached New York's Court of Appeals, Wardius had been decided. On the basis of that decision, the New York court held that

the State's notice-of-alibi statute was unconstitutional, but declined to apply this holding retroactively in Bush's case. The court reasoned that retroactive application of Wardius would be appropriate only where, as was true in Wardius, a defendant had actually been foreclosed from presenting an alibi defense because of his failure to comply with a non-reciprocal notice-of-alibi statute. People v. Bush, 33 N Y 2d 921 (1973), cert. den. 419 U.S. 848 (1974). Bush contends, however, that Wardius should also be applied retroactively in cases such as this where application of the unconstitutional notice provision conceivably impaired the defendant's ability to impeach and surrebut the testimony of the State's rebuttal witnesses.

At least under the circumstances of this case, this contention must be rejected. The first of the State's three rebuttal witnesses was Mr. Rawitz. He testified that Bush cashed a bad check at his Brooklyn bar on August 26, 1969, four days before the murder. While this testimony contradicted Bush's grand jury testimony, it was consistent with his testimony at trial. Presumably for this reason, Rawitz was not cross-examined.

The only rebuttal witnesses who contradicted the trial version of Bush's alibi were a Mr. and Mrs. Curtis. They testified that in the summer of 1969 they had rented a room to Bush's cousin, Gerald Richardson, that Bush had shared the room with Richardson during the latter part of the summer, and that Mr. Curtis had been forced to evict Bush and Richardson on September 16, 1969, for failure to pay the rent. Since Bush had previously testified to his presence in New Orleans during the entire month of September, 1969, defense counsel cross-examined both Mr. and Mrs. Curtis. Significantly, however, at no time did defense

counsel move for a recess or a continuance in which to prepare his cross-examination of any of the three rebuttal witnesses. See Green v. Fogg, 422 F. Supp. 1034, 1036 (S.D.N.Y. 1976). Nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identity of these witnesses prior to their testimony. See Mayer v. Moeykens, 373 F. Supp. 649, 654 (D. Vt. 1973), affd. 494 F. 2d 855 (CA2), cert. den. 417 U.S. 926 (1974).

"The test utilized repeatedly by [the Supreme] Court to ascertain whether 'new' constitutional protections in the area of criminal procedure are to be applied retroactively calls for consideration of three criteria: '(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.'" Michigan v. Payne, 412 U.S. 47, 51 (1973) (citations omitted).

A. Purpose of the New Standard

"Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdict in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 U.S. 646, 653 (1971). Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been

substantially impaired. See United States ex rel. Hairson v. Warden, 407 F. Supp. 524 (N.D. Ill.), revd. on other grounds 539 F. 2d 713 (CA7 1976); People v. Bush, supra (dictum). Here, however, Bush was not deterred from presenting his alibi defense. Moreover, no continuance was requested, and no specific prejudice was then or has subsequently been alleged. Under such circumstances, the application of the unconstitutional notice provision in Bush's case should not be assumed to have "substantially" impaired the trial court's truth-finding functions. "[R]etroactivity is not required [merely] by a determination* * * that the truth-determining process has been aided somewhat by the new standard* * *." Gosa v. Mayden, 413 U.S. 665, 680 (1973).

B. Reliance

The Wardius doctrine was not clearly forecast by any prior decision of the Supreme Court. Indeed, in Williams v. Florida, 399 U.S. 78, 82 n. 11 (1970), where the Court upheld Florida's reciprocal notice-of-alibi statute, it expressly noted that it was not deciding the constitutionality of N.Y. Code Crim. Proc. § 295-1. Nor can it be said that the Wardius decision was clearly forecast by any trend of lower court decisions. Under such circumstances, legislative and judicial reliance on the New York notice-of-alibi provision was justifiable.

C. Effect of Retroactive Application

Because that reliance began in 1935 when the provision went into effect, the retroactive application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York, not to mention other states with similar statutes, e.g., Oregon and Illinois.

D. Conclusion

Since all three of the relevant criteria articulated by the Supreme Court indicate that Bush should not be allowed to benefit from retroactive application of the Wardius doctrine, his claim to the contrary is rejected.

POINT I

PETITIONER HAS SO RADICALLY CHANGED HIS ARGUMENT BEFORE THIS COURT THAT HIS APPEAL SHOULD BE DISMISSED FOR FAILURE TO PRESENT HIS ARGUMENT TO THE COURT BELOW AND FOR FAILURE TO EXHAUST HIS STATE REMEDIES

In his brief to this Court, in the note, pp. 21-22, petitioner states that "the district court correctly noted that petitioner did not allege any specific prejudice. In any event, the State's failure to disclose its rebuttal witnesses resulted in grave prejudice for, as noted, cross-examination of the two important rebuttal witnesses could not be effectively mounted."*

* A reading of the petition below supports this statement that no specific prejudice was alleged. The District Court so stated. See A. 20 ("nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identify [sic] of these witnesses prior to their testimony") and A. 21 ("[N]o specific prejudice was then or has subsequently been alleged.")

Although it will be shown below, see Point II, that petitioner suffered no prejudice from the operation of the notice-of-alibi statute, since he did not raise the matter below and since it is an essential element of his argument to this Court, the issue is not properly before this Court. United States ex rel. Robinson v. Vincent, 506 F. 2d 923 (2d Cir. 1974); United States ex rel. Springle v. Follette, 435 F. 2d 1380, 1384 (2d Cir. 1970) cert. den. 401 U.S. 980 (1971).

In addition, although petitioner challenged the constitutionality of the notice-of-alibi statute at trial and throughout his state appeals,* as indicated above, pp. 5, 7, 8-9, 12, petitioner neither claimed any specific prejudice nor that his trial would have been provided the names of the alibi rebuttal witnesses prior to trial. Under these circumstances, his claim of prejudice presented to this Court differs so substantially from his claims in state court that his appeal should be dismissed pursuant to 28 U.S.C. § 2254(b) & (c); see Picard v. Connor, 404 U.S. 270 (1971), for failure to exhaust state remedies.

* See People v. Bush, 33 N Y 2d 921 (1973) motion to amend remittitur granted 34 N Y 2d 537 and petitioner's state appellate briefs.

As reiterated by this Court in Wilson v. Fogg,
____ F. 2d ____, Docket No. 77-2089, slip op. at 1171 (2d Cir.
Jan. 19, 1978):

"[T]his court has consistently applied the rule of Picard v. Connor, supra and required the petitioner to present 'to the State courts the same claim he urges upon the federal courts'. United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1124 (2d Cir.), cert. den. 409 U.S. 1045 (1972) (emphasis in original; see United States ex rel. Gibbs v. Zelker, 496 F. 2d 991, 994 [2d Cir. 1974]. See also Gates v. Henderson, Dkt. No. 76-2065, slip op. 5361 [2d Cir. August 19, 1977] [en banc]; Cameron v. Fastoff, 543 F. 2d 971 [2d Cir. 1976])."

Petitioner's new claim of substantial prejudice* sufficiently changes his challenge to the effect on him of the Code of Criminal Procedure § 295-1 so that the claim cannot be construed to be the same claim brought to the attention of the State courts. Indeed, the state claim, never presented in more than two pages, appears to claim, at most, an inconvenience to counsel during trial. (It would be disingenuous

* Bush's claim is, in any event, without merit, see Point II, post. In that he now presents a new set of factual allegations to this Court, he must first present those facts to the State courts. Anderson v. Casscles, 531 F. 2d 682 (2d Cir. 1976); United States ex rel. Cleveland v. Casscles, 479 F. 2d 15 (2d Cir. 1973).

for petitioner to claim that he did not expect the prosecutor to call rebuttal witnesses). Indeed, after the cross-examination of the people's rebuttal witnesses, counsel claimed merely that he could have done a better job on cross-examination, but he hoped he "did a job" (655).

Not having presented his claim to the state courts or the court below, petitioner is not now properly before this Court.*

POINT II

PETITIONER SUFFERED NO PREJUDICE BY OPERATION OF NEW YORK'S FORMER NOTICE-OF-ALIBI STATUTE

In Wardius v. Oregon, 412 U.S. 470 (1973), the defendant, unlike petitioner here, was prevented from introducing any evidence to support his alibi defense since he had failed to comply with the Oregon statute by giving a list of his alibi witnesses to the prosecution. In holding that Due Process "forbids enforcement of alibi rules unless reciprocal

* Whether New York will entertain a collateral challenge to petitioner's conviction is, of course, "a matter of New York law to be decided by New York courts and not by federal court predictions of what stances those courts will take." Wilson v. Fogg, supra, slip op. at 1178.

discovery rights are given to criminal defendants." 412 U.S. at 412, the court in Wardius stated that:

"It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state." 412 U.S. at 475.

The court, however, clearly issued a caveat: "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, but cf. Brady v. Maryland, 373 U.S. 831 (1963)", 412 U.S. at 974 and does not require a state to adopt a reciprocal discovery statute. 412 U.S. at 475. Wardius was awarded a new trial because of the "substantial possibility" that the preclusion of his alibi witnesses "infected the verdict". 412 U.S. at 479.

When petitioner's case came before the New York Court of Appeals, it found that the operation of New York's notice-of-alibi statute in petitioner's case "did not go to 'the very integrity of the fact-finding process'" 33 N Y 2d 923 since petitioner had not been precluded from presenting his alibi defense. Where a defendant had been precluded from presenting an alibi witness, the New York Court of Appeals was

not reluctant to conclude that "[t]he due process standards. . . sought to be applied retroactively 'profoundly and directly' affected the fact-finding process itself" and ordered a new trial. People v. Morales, 37 N Y 2d 262, 269 (1975).*

The assumptions underlying petitioner's argument are that he was as prejudiced in the presentation of his defense as were Wardius and Morales and that fundamental fairness required that he discover the names of the State's rebuttal witnesses even had he not provided the prosecutor with his list of alibi witnesses.

Petitioner's argument fails because the integrity of the truth-finding process was not affected in his case in the degree that it was in Wardius v. Oregon, supra or People v. Morales, supra. Moreover, petitioner was in no worse position than had he not been required to provide his list of alibi

* Indeed, insofar as People v. Bush, supra and not Wardius v. Oregon, supra, invalidated New York's notice-of-alibi statute, what petitioner really requests of this Court is not the retroactive application of Wardius, but the retroactive application of Bush. However, "[t]here is nothing in the Constitution which requires a state to make its decisions retroactive." United States ex rel. Bund v. LaVallee, 344 F. 2d 313 (2d Cir. 1965) cert. den. 382 U.S. 867 (1965).

witnesses to the prosecutor. That petitioner was not seriously prejudiced by the operation of New York's then notice-of-alibi statute is demonstrated by many facts:

1. Petitioner voluntarily supplied the names of his alibi witnesses independently of the prosecutor's request for a list of his alibi witnesses by asking for the appointment of a commission to take those witnesses' testimony in New Orleans.

The prosecutor requested a list of petitioner's alibi witnesses on August 17, 1970. By Notice of Motion and Affidavit dated August 19, 1970, petitioner requested an order protecting him from the prosecutor's demands and requested the court to appoint a commission in New Orleans "to examine certain witnesses in behalf of the defendant, pursuant to Chapter IV, §§ 636-657 inclusive, of the Code of Criminal Procedure."*

In his affidavit, petitioner requested that the testimony of "his wife Patsy Bush, his son, his mother-in-law, Vivian Williams, and his mother, Helen Bush" be taken in New Orleans.

* See Notice of Motion dated August 19, 1970. This information essentially is admitted to by petitioner in his Brief, p. 4 and is obtained from the copies of the State papers filed by him with this Court.

On September 25, 1970, the Court ordered petitioner to provide a list of his alibi witnesses and granted petitioner's request for a Commission.

On November 2, 1970, petitioner supplied the list of his alibi witnesses and the list of those witnesses he wished to have testify before a Commission in New Orleans. It included all of his alibi witnesses, including Donald Bush who also testified at trial.*

Thus, even had the prosecutor not made a notice-of-alibi demand, he would have known whom petitioner was going to call as alibi witnesses, and even their testimony, because they were deposed, before trial, in New Orleans at petitioner's request. Petitioner, thus, voluntarily gave his list of witnesses to the prosecutor and cannot claim prejudice by operation of the notice-of-alibi statute.

2. As the Court stated in Wardius v. Oregon, supra and reiterated in Weatherford v. Bursey, ___ U.S. ___, 45 U.S.L.W. 4154 (Feb. 22, 1977), "there is no general constitutional right to discovery in a criminal case." 45 U.S.L.W. at 4158.

* See petitioner's Brief, p. 6, note.

In Weatherford v. Bursey, supra, in reply to the criminal defendant's claim that he had been unable to counter a particular witness' "devastating testimony" due to alleged nefarious deeds of the government, the Court stated that "the disadvantage was no more than exists in any case where the Government presents very damaging evidence that was not anticipated." 45 U.S.L.W. at 4158.

The federal government is not required to provide a criminal defendant with a list of its witnesses prior to trial in a non-capital case. Federal Rules of Criminal Procedure, Rule 16(a)(2);* United States v. Gottlieb, 493 F. 2d 907 (2d Cir. 1974); United States v. Persico, 425 F. 2d 1375 (2d Cir. 1970) cert. den. 400 U.S. 869 (197); United States v. Frohn, 558 F. 2d 380 (8th Cir.), cert. den. 98 S. Ct. 207 (1977).

Although the Federal Rules of Criminal Procedure now contain a reciprocal notice-of-alibi statute, Rule 12.1, that was not effective until December 1, 1975, so prior to that, there was no discovery in non-capital cases.

* A provision requiring names of witnesses to be exchanged three days prior to trial was defeated. See Historical Note after 18 U.S.C.A. Rule 16.

Even under the Jencks Act, 18 U.S.C. § 3500, the defendant does not receive any prior statement of the witness until after he has testified, see Goldberg v. United States, 425 U.S. 94 (1976).

Since the prosecutor had a list of petitioner's rebuttal witness without the operation of the notice-of-alibi statute, because of petitioner's voluntarily revealing their names through his request to have a Commissioner take their testimony in New Orleans, there is no authority on which petitioner can rely for a list of the prosecutor's rebuttal witnesses. He had no general constitutional or statutory right to discover the prosecutor's witnesses. Even had there been no disclosure of the petitioner's alibi witnesses, had the prosecutor been surprised at trial, he could have obtained a continuance. People v. Morales, supra, 37 N Y 2d at 270.*

* In Williams v. Florida, 399 U.S. 78 (1970), in challenging Florida's reciprocal notice-of-alibi statute on Fifth Amendment grounds, the defendant argued that the preferred course would be for the prosecutor to request a continuance after the defendant's presentation of his alibi witnesses, 399 U.S. at 85-86.

Thus, petitioner's underlying assumption, that he was prejudiced at trial because he did not have advance notice of the prosecutor's rebuttal witnesses, is without merit. He would have been in the same position, and a position supported by the Constitution, had the prosecutor not served his notice-of-alibi demand.

3. Significantly, petitioner has never stated what his meaningful trial strategy or his meaningful cross-examination would have been had he had advance notice of prosecutor's rebuttal witnesses. The two most important rebuttal witnesses were vigorously cross-examined (624-33, 634-35, 639-52, 653-54).* Counsel expressed satisfaction with his cross-examination (655) and attacked the witnesses in his summation (697, 708-09).**

4. Petitioner's satisfaction with his cross-examination is shown by his failure to request a continuance after the direct examination of the people's rebuttal witnesses. Petitioner could

* The third was not cross-examined, most likely because his testimony did not conflict with petitioner's. The witness testified he had seen petitioner in Brooklyn on August 26, 1969 while petitioner claimed only that he was in New Orleans on August 27, 1969.

** Petitioner had no trouble cross-examining those witnesses presented in rebuttal to his claim that his confession had been coerced.

have requested a continuance. See People v. Morales, supra, 37 N Y 2d at 270, and the court's failure to grant one would have bolstered petitioner's due process claim. See United States ex rel. Lucas v. Regan, 503 F. 2d 1 (2d Cir. 1974) cert. den. 420 U.S. 939 (1975).

Petitioner's failure to request a continuance, however, precludes his claim of prejudice. See Weatherford v. Bursey, supra, 45 U.S.L.W. at 4158; United States v. Krohn, supra; Green v. Fogg, 422 F. Supp. 1034 (S.D.N.Y. 1976). Had he requested and been granted a continuance, he could have avoided his subsequent challenges to the statute, cf. Wainwright v. Sykes, 97 S. Ct. 2497 (1977).

5. Petitioner was liberally provided with discovery material.* The affidavit of petitioner's attorney in opposition to the prosecutor's notice-of-alibi request and in support of his request for a commission, dated August 19, 1970, recites all of the people's case except for the alibi rebuttal witnesses. That affidavit also admits being provided a bill of particulars.

* On appeal to this Court in Mayer v. Moeykens, 373 F. Supp. 649 (D. Vt. 1973) (Waterman, J.) affd. 494 F. 2d 855 (2d Cir.) cert. den. 417 U.S. 926 (1974), the Wardius claim was dropped at oral argument because of Vermont's liberal discovery rules.

At trial, petitioner was provided with all prior statements of the witnesses (what would be Jencks material in federal court).

6. The rebuttal witnesses were known to petitioner. The two most important ran the boarding house where he lived. The third operated a bar which petitioner frequented and where he cashed a check on August 26, 1969, four days before the murder. They were not merely witnesses to the crime, people whom petitioner could claim he had never met and whose testimony he could not anticipate.

7. Petitioner testified at the grand jury that he left Brooklyn for New Orleans two months before the murder [see opinion of District Court, A. 13).* It is not unreasonable to assume the prosecutor would have been prepared to rebut such testimony should it be repeated at trial.

* The relevant part of petitioner's Grand Jury testimony is included in the State court papers provided to the Court.

Petitioner, thus, was not prejudiced by the operation of New York's notice-of-alibi statute. His assumption that he could have fairly defended himself only had he been provided the names of the prosecutor's rebuttal witnesses is without support in the Constitution. Had no mention been made of the notice-of-alibi statute, the prosecutor would have been alerted to petitioner's alibi, but the petitioner would have had no constitutional right to advance knowledge of the prosecutor's rebuttal witnesses.

POINT III

WARDIUS V. OREGON, SHOULD NOT BE
APPLIED RETROACTIVELY TO THIS CASE.

Assuming, arguendo, that it is proper to discuss this case in terms of the retroactivity of Wardius v. Oregon, supra, rather than People v. Bush, supra, since it was the latter that overturned New York's Notice-of-alibi Statute and not the former, see note, p. 23, ante, the traditional retroactivity analysis leads to the conclusion that Wardius should not be so applied. That was the conclusion in this case of both the New York Court of Appeals and the District Court.

The District Court correctly applied the three prong test repeatedly used by the Supreme Court to decide whether a new constitutional ruling should be applied retroactively:

"(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." District Court opinion (A. 20) citing Michigan v. Payne, 412 U.S. 47, 51 (1973);

Accord Stovall v. Denno, 388 U.S. 293 (1967); Desist v. United States, 354 U.S. 244 (1969).

1. Purpose

As the District Court states, "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect.' Williams v. United States, 401 U.S. 646, 653 (1971)." (A. 20-21) (emphasis supplied); Ivan V. v. City of New York, 407 U.S. 203 (1972). The issue, however, is a matter of degree. Johnson v. New Jersey, 384 U.S. 719 (1966); Stovall v. Denno, supra.

As the Court of Appeals found, the rule here did not go to "'the very integrity of the fact-finding process'", 33 N Y 2d at 993. It merely went to the collateral issue of two witness' credibility, which was vigorously attacked in any event.*

* It has been held that Brady v. Maryland, 373 U.S. 83 (1963) was not violated by failure of a prosecutor to turn over material about a witness' credibility and not relevant to the defendant's guilt. Klein v. Smith, 383 F. Supp. 485 (S.D.N.Y. 1975) affd. 559 F. 2d 189 (2d Cir. 1977) cert. pet. filed.

There can be no question here about the guilty verdict. Petitioner confessed completely to the crime. He did present his alibi witnesses. It is clear that the truth-finding function of the trial was not substantially impaired and petitioner suffered no prejudice, see Point II, ante.*

2. Reliance

The prosecutor here properly relied on New York's Notice-of-alibi Statute at a trial held more than two years prior to Wardius v. Oregon, supra.

Petitioner's claim that Williams v. Florida, 399 U.S. 578 (1970) clearly foreshadowed the demise of the New York Statute simply is not true. As the District Court correctly stated, (A. 21-22), the Court in Williams specifically stated that it was not deciding the constitutionality of New York's Notice-of-alibi statute, Code of Criminal Procedure § 295-1, 399 U.S. at 82, n. 11.

* The right to counsel cases relied on by petitioner are clearly inapposite since the right to counsel is fundamental. Similarly, the right to confrontation cases, Roberts v. Russell, 392 U.S. 293 (1968) and Bever v. California, 393 U.S. 314 (1966), are inapposite since petitioner was not denied his right to confrontation.

A number of courts upheld non-reciprocal Notice-of-alibi Statutes after Williams v. Florida, supra, but before the decision in Wardius v. Oregon, supra; People v. Sherrod, 32 Mich. App. 183, 188 N.W. 2d 221 (1971); People v. Holiday, 47 Ill. 2d 300, 265 N.E. 2d 634 (1970); Commonwealth v. Phoenix, 217 Pa. Super. 121, 268 A. 2d 460 (1970); People v. Hairston, 10 Ill. App. 3d 678, 294 N.E. 2d 748, lv. to app. denied, 54 Ill. 2d 594 (1973); Commonwealth v. Jackson, 224 Pa. Super. 280, 303 A. 2d 519 (1973) rev'd after Wardius v. Oregon, 319 A. 2d 161 (Pa. Sup. Ct. 1974).

In United States ex rel. Snyder v. Mack, 372 F. Supp. 1077 (E.D. Pa. 1974), the Court found that Williams v. Florida, supra, left undecided the validity of non-reciprocal Notice-of-alibi Statute. In Allison v. Wisconsin, 62 Wis. 2d 14, 214 N.W. 2d 437 (1974), cert. denied. 41 U.S. 1071 (1974), the Court found that reliance on a pre-Wardius non-reciprocal Notice-of-alibi Statute was reasonable.

Finally, the Notice of Advisory Committee on Rules following 18 U.S.C.A. Rule 12.1 state that Williams v. Florida, supra, left unresolved the issue of non-reciprocal Notice-of-alibi Statutes.

Under these circumstances, it was not unreasonable for the trial court and the prosecutor to rely on an existing New York Statute. The District Court's finding that the "legislative and judicial reliance" on the New York Statute was "justifiable" (A. 22) is clearly correct.*

3. Effect

A number of other States had non-reciprocal Notice-of-alibi Statutes prior to Wardius v. Oregon, supra, e.g. Illinois, Vermont, Wisconsin, Michigan and Pennsylvania. In almost all, the decision in Wardius was not held retroactive to non-preclusion cases like petitioner's.**

Although the number of cases that would be affected by retroactive application of Wardius cannot be ascertained easily, since an alibi is a common defense, the number could

* Petitioner's claim that the prosecutor unfairly exploited the New York Statute does not bear scrutiny, since petitioner's alibi would have been known to it by other means and because the exact purpose of the Statute is to prevent the concocting of a defense, see Williams v. Florida, supra.

** See Point III, sub-point "4", post.

be great. New York has acted so that those cases where a defendant's alibi witnesses were precluded are guaranteed a retrial. People v. Morales, supra.

As the District Court noted, New York's Statute was in effect since 1935. A retrial in these cases, and even in petitioner's, where the crime occurred in 1969, would be virtually impossible. The effect here would be to set free someone duly convicted of a senseless and brutal murder.*

4. The Decisions of Other Courts

This writer's research has found that Wardius has been almost uniformly held non-retroactive in non-preclusion cases, i.e., where the defendant was not precluded from presenting his alibi defense.

In Mayer v. Moeykens, supra (Waterman, J.), the District Court refused to apply Wardius retroactively because the petitioner, like the petitioner here, did not show any material prejudice.**

* Petitioner's claim that Wardius should be applied to cases on direct appeal when it was decided, makes no sense, since the prosecutor had already relied on preexisting law.

** The issue was dropped on appeal.

In Rohl v. Wisconsin, 65 Wis. 2d 683, 223 N.W. 2d 567 (1974) Wardius was held not retroactive where there was no preclusion although the defendant did claim surprise by reason of the State's rebuttal witness whose testimony the defendant claimed he was unable to impeach.

Similarly, in Allison v. Wisconsin, supra, Wardius was held not retroactive since the "totality of the fact finding process", 214 N.W. 2d at 445, was not affected.

Kelsaw v. Oregon, 412 U.S. 947 (1973) after remand, 14 Or. A. 313, 513 P. 2d 516 (1973) and Cline v. Illinois, 414 U.S. 970 (1973), after remand, 19 Ill. App. 3d 446, 311 N.E. 2d 599 (1974), affd. 60 Ill. 2d 561, 328 N.E. 2d 534 (1975) were vacated and remanded for further consideration in light of Wardius, but in both cases alibi witnesses had been precluded from testifying.* United States ex rel. Hairston v. Warden, 407 F. Supp. 524 (N.D. Ill.) rev'd 539 F. 2d 713 (7th Cir. 1976) cert. den. ___ U.S. ___, also was essentially a preclusion case.**

* In addition, it appears that the retroactivity issue was not considered.

** In its "Unpublished Order Not to be Cited Per Circuit Rule 28", the Seventh Circuit in Hairston did not consider the retroactivity of Wardius "because it is clear from the state court record that petitioner was not harmed by application of the Illinois Statute."

Pennsylvania, without discussing the issue of retroactivity, so applied Wardius in a preclusion case, Commonwealth v. Contakos, 455 Pa. 136, 314 A. 2d 259 (1974), and where the rebuttal witness was merely an unknown witness to the crime, Commonwealth v. Jackson, 319 A. 2d 161 (Pa. Sup. Ct. 1974).

New York's approach to the retroactivity of Wardius, thus, is sound and is supported by other States. Wardius should not be applied retroactively where none of the defendant's alibi witnesses were precluded from testifying.

POINT IV

THE TRADITIONAL HARMLESS ERROR
TEST PRECLUDES THE APPLICATION
OF WARDIUS V. OREGON TO PETITIONER.

Assuming, arguendo, that Wardius v. Oregon, supra, should have been applied retroactively to petitioner, not doing so is harmless error beyond a reasonable doubt.

Petitioner has not challenged his confession in this Court. He could not do so seriously. The finding of the District Court sustaining the State court's finding of

voluntariness stands. The confession was complete. It leaves no room to doubt that petitioner committed the murder.*

Constitutional error can be considered harmless where the error was clearly harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967). Harrington involved a Sixth Amendment Confrontation Clause question. Yet, the Court did find harmless error. A conviction derived in contravention of Wardius v. Oregon, supra, has been held harmless error. People v. Fields, 59 Ill. 2d 516, 322 N.E. 2d 33 (1974) cert. denied 423 U.S. 843 (1975).

In Wardius v. Oregon, itself, the petitioner was entitled to a new trial because there was "a substantial possibility that [the Court's] error may have infected the verdict." 412 U.S. at 479. In light of petitioner's complete and full confession, any error at his trial could not have infected the verdict of guilt.

* The confession is set forth at 321-25, 331-33, 423-34.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DISMISSING THE PETITION SHOULD
BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
February 15, 1978

Respectfully submitted,

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